UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CICILY BRANCH,

Plaintiff,

v.

ROBERT A. MCDONALD,

Defendant.

Case No. 14-cv-03846-DMR

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 22

Plaintiff Cicily Branch brings this employment action. Defendant Robert A. McDonald, Secretary of Veterans Affairs, moves pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss Plaintiff's amended complaint, or in the alternative, for summary judgment. [Docket No. 22.] After a hearing, the court issued an order granting Defendant's motion in part and ordering further evidentiary submissions in support of Plaintiff's remaining claims. [Docket No. 30 (Order on Def.'s Mot. to Dismiss).] The parties timely filed the submissions. [Docket Nos. 34 (Branch Decl., May 19, 2015), 35 (Def.'s Objections).] The court also ordered the parties to provide supplemental briefing, which the parties timely filed. [Docket Nos. 38, 45-47.]

The court finds this matter is appropriate for resolution without a hearing. *See* N.D. Cal. Civ. Local Rules 7-1(b). For the following reasons, the court grants the motion.

I. Background

Plaintiff makes the following allegations in her complaint. Plaintiff, who is from Guyana, is 62 years old. She worked as a Registered Nurse at the San Francisco VA Medical Center (SFVAMC or "hospital") from 2000 until her retirement in October 2013. (Am. Compl. ¶ 6.)

Plaintiff alleges that throughout her employment, SFVAMC subjected her to a pattern and practice of discrimination and harassment because she is "Black/Caribbean" and because she suffers from knee problems that limit her mobility. (Am. Compl. ¶ 11.) For example, when

Plaintiff initially applied for a transfer to SFVAMC from a VA hospital in Seattle, she sought a position in either the Intensive Care Unit (ICU) or Critical Care Unit (CCU) for which she had received specialized training. However, she was told there were no positions in those units and was instead placed in the Transitional Care Unit (TCU). Over the next few years, SFVAMC hired several new nurses for the ICU and TCU, all of whom were either Caucasian or Filipina. Plaintiff never received notice that such positions were available, ostensibly preventing her from applying to transfer to those units. (Am Compl. ¶¶ 12, 13.) In addition, SFVAMC delayed a process called "boarding" (which Plaintiff does not explain) for five years after Plaintiff arrived in San Francisco, which allegedly negatively impacted Plaintiff's salary and promotion opportunities. (Am. Compl. ¶ 14.)

Plaintiff fell at work in 2000 and the resulting injury left her with limited mobility that made kneeling and squatting difficult. However, Plaintiff was able to complete her job duties by asking colleagues and nursing assistants to assist her by carrying out tasks that required kneeling or squatting. (Am. Compl. ¶ 16.) In 2008, Plaintiff had knee replacement surgery on her left knee. After surgery, she returned to work with the restriction of no kneeling and squatting. Plaintiff continued to seek assistance from others when she was required to kneel. (Am. Compl. ¶ 17.)

In June 2013, Plaintiff had knee replacement surgery on her right knee and was off work for several months. On October 1, 2013, her doctor released her to work with modified duties, and Plaintiff provided her doctor's note to her supervisor. (Am. Compl. ¶¶ 18, 30.) After completing her first shift back at work on October 1, 2013, Plaintiff was advised that SFVAMC would be unable to accommodate her work restrictions and that it would not permit her to work until her doctor had removed all restrictions. (Am. Compl. ¶¶ 19, 31.) According to Plaintiff, SFVAMC accommodated Caucasian employees with light duty work but refused to accommodate her by allowing her to receive assistance from orderlies or nursing assistants to perform tasks requiring kneeling. (Am. Compl. ¶ 20.)

Plaintiff went to Human Resources for assistance, and was told that she was eligible for retirement. (Am. Compl. ¶ 23.) According to Plaintiff, HR "never offered information about

filing a complaint, about finding another position in the Hospital, about engaging in the interactive process, or about appealing the denial [of] accommodation." (Am. Compl. ¶ 23.) Plaintiff alleges that the modification she sought—assistance from other employees with duties involving bending or squatting—was "minimal," but that SFVAMC was "unyielding in its refusal to offer her modified duties." Plaintiff also alleges that SFVAMC failed to propose any alternative accommodations for Plaintiff, nor did it engage in any dialogue with Plaintiff regarding possible accommodations that would allow her to continue working despite her limitations. (Am. Compl. ¶¶ 33, 34.) Plaintiff asserts that she felt that she had no choice but "to comply with the directive from HR to retire." (Am. Comp. ¶ 34.) Plaintiff alleges that on December 5, 2013, she filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging unlawful employment practices based on disability, national origin, age, and race/color. (Am. Compl. ¶ 9.)

II. Procedural History

In her original complaint, Plaintiff asserted nine claims against SFVAMC. [Docket No. 1.] Plaintiff filed an amended complaint on January 23, 2015, asserting four claims against Defendant: 1) discrimination and harassment on the basis of her race/color (Black) under 42 U.S.C. § 1981; 2) retaliation for opposing and/or complaining of Defendant's discriminatory practices against herself and other employees in violation of 42 U.S.C. § 1981; 3) discrimination and harassment on the basis of her race/color (Black) and/or national origin (Guyanese) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; and 4) failure to reasonably accommodate Plaintiff's disability in violation of Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*[1] [Docket No. 18.]

Defendant moved to dismiss Plaintiff's amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or in the alternative, for summary judgment pursuant to Rule 56. Plaintiff conceded her section 1981 claims as well as her claims based on pre-2013 incidents; the court dismissed those claims with prejudice. (Order on Def.'s Mot. to Dismiss 5.)

[1] Plaintiff's amended complaint contains causes of action numbered 1-3 and 5; it does not include a fourth cause of action. The court will refer to the "fifth" cause of action, violation of the Rehabilitation Act, as the fourth.

As to the remaining Title VII and Rehabilitation Act claims, Defendant moved to dismiss them on the grounds that they are barred by Plaintiff's failure to timely exhaust her administrative remedies. "[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *see also Vinieratos*, 939 F.2d at 768 n.5 ("[w]e do not recognize administrative exhaustion under Title VII as a jurisdictional requirement per se . . . the issue is whether the plaintiff has satisfied a statutory precondition to suit." (emphasis removed)). Therefore, the court concluded that Defendant's motion should be treated as a Rule 12(b)(6) motion to dismiss for failure to state a claim, rather than a motion challenging subject matter jurisdiction pursuant to Rule 12(b)(1). *See, e.g., Shepard v. Winter*, No. 06-5463 RBL, 2007 WL 3070495, at *4 (W.D. Wash. Oct. 19, 2007), *aff'd*, 327 F. Appx. 691 (9th Cir. 2009) (holding motion to dismiss for failure to exhaust administrative remedies must be evaluated as Rule 12(b)(6) motion); *De Los Reyes v. Ruchman & Assocs., Inc.*, No. 14-cv-00534-WHO, 2014 WL 4354238, at *5 (N.D. Cal. Sept. 2, 2014) ("Because the court's jurisdiction is not in question, the issue [of exhaustion] cannot be resolved on a 12(b)(1) motion.").

In support of his motion, Defendant submitted two declarations containing evidence regarding Plaintiff's decision to retire, the effective date of her retirement, and the date she initiated EEO counseling. When a court considers matters outside the pleadings on a motion under Rule 12(b)(6), it must convert the motion into a Rule 56 motion for summary judgment, and in so doing, the court must give "[a]ll parties . . . a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d); *see also San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998) ("In providing notice to the parties, 'a district court need only apprise the parties that it will look beyond the pleadings to extrinsic evidence and give them an opportunity to supplement the record.'" (citation omitted)). The court granted Plaintiff leave to file supplemental evidence on the issue of administrative exhaustion, and

permitted Defendant to file objections to Plaintiff's evidence.[2] The parties timely filed the requested submissions. Having provided the parties the opportunity to supplement the factual record, the court will evaluate Defendant's motion under Rule 56.

III. Legal Standard

A court shall grant summary judgment "if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden of establishing the absence of a genuine issue of material fact lies with the moving party, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), and the court must view the evidence in the light most favorable to the non-movant. *See Scott v. Harris*, 550 U.S. 372, 378 (2007) (citation omitted). A genuine factual issue exists if, taking into account the burdens of production and proof that would be required at trial, sufficient evidence favors the non-movant such that a reasonable jury could return a verdict in that party's favor. *Anderson v. Libby Lobby, Inc.*, 477 U.S. 242, 248. The court may not weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. *See id.* at 249.

To defeat summary judgment once the moving party has met its burden, the nonmoving party may not simply rely on the pleadings, but must produce significant probative evidence, by affidavit or as otherwise provided by Federal Rule of Civil Procedure 56, supporting the claim that a genuine issue of material fact exists. *TW Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citations omitted). In other words, there must exist more than "a scintilla of evidence" to support the non-moving party's claims, *Anderson*, 477 U.S. at 252; conclusory assertions will not suffice. *See Thornhill Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Similarly, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts" when ruling on the motion. *Scott*, 550 U.S. at 380.

[2] Plaintiff's counsel represented that the question of whether Plaintiff timely exhausted her administrative remedies turns on Plaintiff's actions between the date of her last shift on October 1, 2013 and the effective date of her retirement, which was October 31, 2013. Based on this representation, the court concluded that the information necessary for full consideration of the motion for summary judgment was within Plaintiff's control, and did not require discovery.

IV. Discussion

Defendant argues that he is entitled to summary judgment on Plaintiff's Rehabilitation Act and Title VII claims because Plaintiff did not initiate the required EEO process within the statutory timeframe with respect to the events leading up to her October 2013 retirement. Plaintiff counters that she initiated the EEO process in a timely fashion. In the alternative, Plaintiff argues that any untimeliness is excused by waiver or equitable tolling.

Both the Rehabilitation Act and Title VII require a federal employee to exhaust her administrative remedies before pursuing a claim in district court. *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 550 (9th Cir. 1997); *Vinieratos v. U.S. Dep't of the Air Force*, 939 F.2d 762, 767-68 (9th Cir. 1991). Federal regulations provide that employees "who believe they have been discriminated against . . . must consult [an EEO counselor] prior to filing a complaint in order to try to informally resolve the matter." 29 C.F.R. § 1614.105(a). "An aggrieved person must initiate contact with [an EEO counselor] within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action," such contact must occur "within 45 days of the *effective date of the action.*" 29 C.F.R. § 1614.105(a)(1) (emphasis added). "Failure to comply with this regulation is fatal to a federal employee's discrimination claim." *Cherosky v. Henderson*, 330 F.3d 1243, 1245 (9th Cir. 2003) (quotation marks and citation omitted).

Plaintiff's final scheduled shift was a night shift that began on October 1, 2013 and ended on October 2, 2013. (Branch Decl. ¶¶ 10, 11.) At the conclusion of her shift on October 2, 2013, Nurse Manager Karen Dunn told her that SFVAMC would be unable to accommodate her work restrictions and recommended that she look for another position. (Branch Decl. ¶¶ 12, 14.) On October 2, 2013, Plaintiff applied for and was granted leave without pay from October 2, 2013 through October 31, 2013. (Lichtenberger Decl., Feb. 23, 2015, Ex. E.) On October 3, 2013, at Dunn's suggestion, Plaintiff consulted with the Human Resources department and learned she was eligible for retirement. (Branch Decl. ¶¶ 15, 17.) Human Resources Specialist Brett Laidler told Plaintiff that if she submitted her "retirement paperwork immediately, [she] would have several weeks before the retirement was effective," during which Plaintiff could search for another position at SFVAMC. (Branch Decl. ¶ 17.) The same day, October 3, 2013, Plaintiff wrote to

Nurse Manager Karen Dunn, noting that

> [s]ubsequent to our meeting 10/3/13 about restrictions on my return to work certificate and my report and documentation of progressive vision impairment it was agreed that Patient care and patient safety would be compromised and I could no longer work on the unit.

(Lichtenberger Decl. Ex. D.) Plaintiff notified Dunn that she would be taking leave until October 31, 2013 and that "at this time I decided to apply for immediate retirement." (Lichtenberger Decl. Ex. D.) Plaintiff's retirement from SFVAMC was effective on October 31, 2013. (Lichtenberger Decl. ¶ 3.)

Plaintiff states that in mid- November 2013, she was referred to Lynn Hart, SFVAMC's Equal Employment Opportunity Program Manager, and that Plaintiff contacted Hart by telephone. (Branch Decl. ¶ 21.) Plaintiff does not identify the date or dates on which she called or spoke with Hart, nor does she describe the substance of any conversations with Hart. According to Hart, Plaintiff called her office during the week of November 25, 2013, but she does not recall speaking with Plaintiff until on or about December 2, 2013. (Hart Decl., March 16, 2015, ¶¶ 9, 10.) Hart states that she discussed the requirements for filing an EEO claim with Plaintiff on that day. (Hart Decl. ¶ 10.) On December 5, 2013, Plaintiff sent a fax to Hart in which she wrote, "I hereby file an EEOC complaint related to the attached incidents that ended in immediate retirement as at [sic] 10/30/13." (Branch Decl. ¶ 21 Ex. B.) A handwritten note on the fax states that Plaintiff's complaint was for failure to accommodate; constructive termination; and "discrimination ended 10/30/13."[3]

[3] There appears to be no dispute that Plaintiff notified Hart of her intention to file an EEO complaint on December 5, 2013. (*See* Hart Decl. ¶ 10 ("On or about December 5, 2013, Ms. Branch notified me that she intended to file an EEO complaint."); Branch Decl. ¶ 21 (attaching fax to Hart dated December 5, 2013).) The court notes, however, that the evidence of Plaintiff's December 5, 2013 fax submitted by both parties is inconsistent and confusing. Plaintiff's copy is only one page, and contains a handwritten date, "12/5/13." (Branch Decl. Ex. B.) But the document is date-stamped April 6, 2012, well before Plaintiff's retirement. Defendant submitted a similar document that consists of a handwritten fax cover page that is nearly identical to Plaintiff's copy, but it is not the same document and contains no handwritten date. Although Defendant asserts the document is from January 29, 2014, the document is date-stamped January 29, 2012. (Lichtenberger Decl. ¶ 12 Ex. D.) Further, Defendant's copy of Plaintiff's fax contains three attachments: 1) a statement regarding Plaintiff's return to work and "events which led to a decision for immediate retirement"; 2) a November 7, 2013 letter from Human Resources Specialist Laidler confirming that Plaintiff's last date of work was October 1, 2013 and that she had "elected to retire voluntarily effective October 31, 2013"; and 3) Plaintiff's October 3, 2013 letter to Dunn. (Lichtenberger Decl. Ex. D.)

On February 3, 2014, Plaintiff filed a Complaint of Employment Discrimination with the Department of Veterans Affairs, complaining of a denial of reasonable accommodation resulting in forced retirement and race and age discrimination, noting that "other nurses working on unit 10/1-10/2 were granted accommodation."[4] (Lichtenberger Decl. Ex. B.[5]) The VA's Office of Resolution Management sent a notice of acceptance of the EEO complaint to Plaintiff's counsel on February 14, 2014, identifying two claims:

> A. Whether complainant was discriminated against based on race, age and disability, when on October 2 and 3, 2012,[6] she was denied a reasonable accommodation [and]
>
> B. Whether complainant was discriminated against based on race, age and disability, when she retired from her Title 38 Registered Nurse position effective November 1, 2013, due to a constructive discharge resulting from the agency failure to accommodate her restrictions.

(Lichtenberger Decl. Ex. C.) Plaintiff filed suit in this court on August 25, 2014, before the VA issued a final determination on Plaintiff's administrative claim.

A. Rehabilitation Act Claim

Defendant argues that Plaintiff is barred from bringing her Rehabilitation Act claim because she failed to initiate EEO counseling within the requisite 45-day time period. Defendant asserts that the statutory clock started running on her failure to accommodate claim no later than October 3, 2013, which was the day after she learned SFVAMC could not accommodate her restrictions, as well as the date she decided to retire. (*See* Branch Decl. ¶¶ 11, 12.) In response,

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Additionally, Plaintiff is inconsistent about the date the alleged discrimination ended. In her opposition to Defendant's motion she identifies October 31, 2013 as the applicable date, but in her declaration she identifies October 30, 2013. (*See* Pl.'s Opp'n 10; Branch Decl. ¶ 21 ("I identified the date the discrimination ended as October 30, 2013").) Viewing the evidence in the light most favorable to Plaintiff, the court will use the later date for purposes of deciding this motion.

[4] Plaintiff has not brought a claim for age discrimination.

[5] Plaintiff's signature on her complaint is dated January 31, 2014, but it appears Plaintiff did not transmit the complaint until February 3, 2014. (*See* Lichtenberger Decl. Ex. B at ECF p. 30.)

[6] The notice's reference to the year 2012 appears to be a typo.

Plaintiff argues that she "last suffered an adverse employment action as an employee of [SFVAMC] on October 31, 2013," which was her last date of employment before her retirement. (Pl.'s Opp'n 10; *see also* Branch Decl. ¶ 21.)

The date that the statutory clock began to run is central to whether Plaintiff initiated the EEO counseling process in a timely manner. In order to determine whether Plaintiff timely exhausted her administrative remedies, the court must "identify precisely the 'unlawful employment practice' of which [she] complains." *Del. State Coll. v. Ricks*, 449 U.S. 250, 257 (1980). The Supreme Court's decision in *Ricks* is instructive. In *Ricks*, after denying plaintiff tenure, defendant offered (and plaintiff accepted) a "terminal" contract allowing him to teach one additional year before being officially terminated. *Id*. at 252-54. Plaintiff challenged the denial of tenure as discriminatory, and claimed that the limitations period should run from the date of the expiration of his terminal contract, and not from the date his tenure was denied. *Id*. at 257. In examining whether plaintiff's EEOC complaint was timely, the Court stated that "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id*. at 258 (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis in *Ricks*). The Court held that "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to [the plaintiff] . . . even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id*. (noting "[t]he emphasis is not upon the effects of earlier employment decisions; rather, it is [upon] whether any present *violation* exists." (quotation marks and citation omitted)). Therefore, the Court concluded that the limitations period commenced to run as of the date the defendant "had established its official position" denying the plaintiff tenure. *Id*. at 262.

Here, Plaintiff complains that SFVAMC failed to accommodate her medical restrictions, which forced her to retire. That alleged discrimination took place on October 3, 2013, when Plaintiff was informed by her supervisor that the hospital was unable to accommodate her. (Lichtenberger Decl. Ex. D.) Plaintiff submits evidence about her efforts to resolve the situation prior to October 31, 2013, the effective date of her retirement, as well as her belief that she could

return to work before that date. For example, she states that she was aware that one or two of her colleagues were being accommodated with light duty in October 2013, and asserts that it was likely that one of them "would return to regular duty in the near future, opening up an opportunity for [her] to have a light duty position." (Branch Decl. ¶ 16.) Plaintiff also contends that there was a chance that her "healing would be very quick" and that her doctor would lift her work restrictions. (Branch Decl. ¶ 16.) Plaintiff describes her efforts to pursue alternative options for light duty positions, including applying for a Tele-Care Advice Nurse position in mid-October 2013. (Branch Decl. ¶¶ 18-20.) However, she never heard back about her application for this position, and by the end of October, she had had no success locating a different position.[7] (Branch Decl. ¶¶ 19, 20.) Therefore, she states she was "forced into retirement" effective October 31, 2013. (Branch Decl. ¶ 20.)

Essentially, Plaintiff asserts that her October 3, 2013 decision to retire was provisional, because she could have changed her retirement election up until October 31, 2013, and much could have happened during those intervening weeks. This improperly focuses the inquiry on Plaintiff's belief as to when the alleged discrimination concluded. In order to assess the timeliness of the administrative exhaustion requirement, the law requires the factfinder to determine the date of Defendant's discriminatory act—in this case, the October 3, 2013 failure to provide reasonable accommodation. There is no record evidence that this decision was anything but final on October 3, 2013, and Plaintiff presents no evidence that anyone at SFVAMC suggested that the denial of accommodation was merely provisional. *See Ricks*, 449 U.S. at 262 (limitations period started running as of date that employer "had established its official position—and made that position apparent to [plaintiff]"). In fact, the evidence shows the opposite—that on October 3, 2013, Dunn "recommended [Plaintiff] pursue nursing opportunities outside the VA organization and encouraged [Plaintiff] to research other jobs."[8] (Branch Decl. ¶ 14.)

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[7] Plaintiff has not asserted a hiring claim and never pleaded a failure to hire in her administrative complaint. (Lichtenberger Decl. Exs. A, B.) Therefore, any claim based upon this alleged failure to hire is barred for failure to exhaust administrative remedies. *See Ong v. Cleland*, 642 F.2d 316, 318 (9th Cir. 1981).

[8] In supplemental briefing, Plaintiff argues that SFVAMC failed to engage in good faith in the

The Ninth Circuit has held that the rejection of a proposed accommodation for a disability constitutes a "discrete act" that accrues when the employer denies an individual employee's request. *See Cherosky*, 330 F.3d at 1247-48 (concluding that the rejection of a proposed accommodation does not give rise to a continuing violation). This is not a case involving a continuing pattern of wrongdoing, or repeated acts that each constitute an illegal act. Here, Defendant's alleged decision to deny her an accommodation is the sole discriminatory act. Dates relating to the consequences of that act, such as Plaintiff's October 31, 2013 retirement, are not determinative. *See Ricks*, 449 U.S. at 258 (proper focus is on the time the discriminatory acts occurred, not on the time the effects are felt); *see also Lukovsky v. City & Cty. of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008) (generally, statute of limitations on cause of action begins to run "when the plaintiff knows or has reason to know of the injury which is the basis of the action"). Defendant's failure to take action after October 3, 2013 does not transform his alleged failure to accommodate into an ongoing violation. *See Ricks*, 449 U.S. at 257 ("[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination."); *McCoy v. San Francisco*, 14 F.3d 28, 30 (9th Cir. 1994) (citing *Ricks*).

In sum, the fact that Plaintiff's employment did not formally end until October 31, 2013 does not change the date of the alleged misconduct. Accordingly, the court finds that the undisputed facts demonstrate that Plaintiff's claim for a failure to accommodate accrued on October 3, 2013. Plaintiff was therefore required to initiate EEO counseling within the requisite

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interactive process to identify a reasonable accommodation, asserting that it "never explored any options other than unpaid leave. According to Plaintiff, the entire 'interactive process' lasted 24 hours." [Docket No. 45 (Pl.'s Suppl. Brief) at 9.] However, she concedes that her assertion that SFVAMC failed to engage in the interactive process is not a separate, stand-alone claim, but is instead "an integral part of the request for a reasonable accommodation." (Pl.'s Suppl. Brief at 5, 6.) Any failure to engage in the interactive process took place on October 3, 2013, the date Plaintiff learned that her request for an accommodation had been denied. *See Long v. Howard Univ.*, 512 F. Supp. 2d 1, 15 (D.D.C. 2007) ("[t]he availability of an interactive process . . . does not alter the applicability of the discovery rule . . . [c]laims of discrimination accrue when the plaintiff is informed of the discriminatory act, regardless of the possibility of discussions or other process thereafter." (citations and quotation marks omitted)).

45-day time period, which ended on November 17, 2013.

The parties do not agree on the date on which Plaintiff initiated EEO counseling. According to Defendant, Plaintiff initiated EEO counseling on December 10, 2013. He submits a December 13, 2013 letter from EEO Specialist David Keller in which Keller writes that he will serve as the EEO counsel "in the matter you reported to the Office of Resolution Management (ORM) on December 10, 2013," and briefly describes Dunn's alleged denial of reasonable accommodation "resulting in the aggrieved being forced to retire." (Lichtenberger Decl. Ex. A.)

Plaintiff offers several possibilities for the date she initiated EEO counseling: "mid-November 2013," December 5, 2013, and December 10, 2013. The court analyzes the evidence supporting the "mid-November 2013" EEO counseling initiation date, since that is the only date which could result in a finding of timely administrative exhaustion. Plaintiff's sole statement in support of a November 2013 initiation date is as follows: "[i]n mid-November 2013, I was referred to Lyn Hart ('Hart'), who I contacted by telephone." (Branch Decl. ¶ 21.) Such contact could satisfy the EEO counselor contact requirement if Plaintiff "exhibited [her] intent" to begin the EEO process when she spoke with Hart. *See Kraus v. Presidio Trust Facilities Div./Residential Mgmt. Branch*, 572 F.3d 1039, 1044 (9th Cir. 2009) ("complainant may satisfy the criterion of EEO Counsel contact by initiating contact with any agency official logically connected with the EEO process . . . and by exhibiting an intent to begin the EEO process" (citation omitted, emphasis removed)). However, Plaintiff's single statement does not provide sufficient detail about what actually occurred in mid-November 2013. Plaintiff does not explain whether she was merely referred to Hart in mid-November, or whether Plaintiff actually made contact with her at that time. Plaintiff does not identify the date on which she spoke with Hart with any specificity beyond "mid-November." Most importantly, Plaintiff does not provide details about any conversation with Hart from which a juror could reasonably conclude that Plaintiff expressed her intent to begin the EEO process by no later than November 17, 2013. Plaintiff's vague reference to a "mid-November 2013" initiation date is therefore insufficient to rebut Defendant's specific evidence that Plaintiff did not actually speak with Hart until December 2, 2013. (Hart Decl. ¶ 10.) *See Anderson*, 477 U.S. at 252 ("[t]he mere existence of a scintilla of

evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

Viewing the evidence in the light most favorable to Plaintiff, the court finds that the earliest date on which Plaintiff could have satisfied the EEO counseling requirement was December 2, 2013, which is beyond the November 17, 2013 deadline for timely initiation of the EEO counseling process.[9]

B. Title VII Claims

Plaintiff's remaining claims are for discrimination and harassment on the basis of her race/color, black, and/or her national origin, Guyanese.

1. Discrimination

Defendant argues that Plaintiff's Title VII discrimination claims are also time-barred because she failed to initiate EEO counseling within 45 days of October 3, 2013, the date she decided to retire.

As noted, the court must "identify precisely the 'unlawful employment practice' of which [she] complains" in order to determine whether Plaintiff timely exhausted her administrative remedies. *Ricks*, 449 U.S. at 257. Plaintiff's administrative charge included the following claims:

> A. Whether complainant was discriminated against based on race, age and disability, when on October 2 and 3, 2012, *she was denied a reasonable accommodation* [and]
>
> B. Whether complainant was discriminated against based on race, age and disability, when she retired from her Title 38 Registered Nurse position effective November 1, 2013, due to a constructive discharge *resulting from the agency failure to accommodate her restrictions*.

(Lichtenberger Decl. Ex. C (emphasis added).) A plain reading of the administrative charge demonstrates that Plaintiff's discrimination claims are expressly tied to Defendant's alleged failure

[9] Plaintiff also argues that she initiated the required counseling on December 5, 2013, the date of her fax to Hart in which she complained of discrimination, (*see* Branch Decl. ¶ 21; Am. Compl. ¶ 9). However, in her opposition to Defendant's motion, she states she "filed the initial claim with the EEO on December 10, 2013." (Pl.'s Opp'n 10.) This inconsistency is irrelevant, given that both dates fall after the November 17, 2013 deadline for timely initiation of the EEO counseling process.

to provide a reasonable accommodation. In other words, Plaintiff alleges that Defendant denied her a reasonable accommodation in part because of her race.

As with her Rehabilitation Act claim, Plaintiff offers no facts demonstrating that the decision to deny her an accommodation was not final on October 3, 2013, nor does she submit evidence that Defendant took adverse action with respect to her employment after that date. As to evidence of discrimination, Plaintiff states that she was aware of three other nurses on her unit who were being accommodated with light duty schedules in October 2013, but she does not provide their race or national origin. (*See* Plaintiff Decl. ¶ 16.) "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination," *Ricks*, 449 U.S. at 257, and Plaintiff has identified no "alleged discriminatory acts that continued until, or occurred at the time of, the actual termination" of her employment. *See id*. Accordingly, Plaintiff has failed to create a triable dispute of fact as to whether her Title VII race and national origin discrimination claims accrued on a date later than October 3, 2013. Therefore, Plaintiff's initiation of EEO counseling on December 2, 2013 was untimely.

2. Harassment

Plaintiff's Title VII cause of action is also based upon her claim that she was subject to "severe and pervasive harassment" due to her race/color and/or national origin." (Am. Compl. ¶ 46.)

Defendant argues that it is entitled to summary judgment on Plaintiff's harassment claim because she never exhausted administrative remedies as to this theory of liability. In her February 3, 2014 Complaint of Employment Discrimination, Plaintiff detailed only the October 3, 2013 failure to accommodate and the resulting "forced" retirement. (Lichtenberger Decl. Ex. B.) It does not mention harassment based on race/color, national origin, or any other characteristic.

Plaintiff did not address this argument, and provides no facts sufficient to create a dispute of fact as to her exhaustion of this claim. Moreover, it appears that Plaintiff's harassment claim is based on pre-2013 incidents, which Plaintiff conceded could not form the basis for any claims because they are time-barred. (*See* Am. Compl. ¶¶ 12-14.) Therefore, the court grants summary judgment on Plaintiff's Title VII harassment claim. *See Lelaind v. City & Cty. of San Francisco*,

576 F. Supp. 2d 1079, 1090 (N.D. Cal. 2008) ("[t]he scope of the administrative charge defines the scope of the subsequent civil action, and unlawful conduct not included in an administrative complaint is not considered by a court unless the conduct is like or reasonably related to the allegations in the administrative complaint, or can reasonably be expected to grow out of an administrative investigation.").

C. Waiver and Equitable Tolling

The court has ruled that Plaintiff did not exhaust her administrative remedies in a timely manner. Plaintiff is therefore precluded from pursuing her discrimination claims in court, unless she can prove waiver, estoppel, or equitable tolling. *Girard v. Rubin*, 62 F.3d 1244, 1246 (9th Cir. 1995); *Boyd v. U.S. Postal Serv.*, 752 F.2d 410, 414-15 (9th Cir. 1985). Here, Plaintiff appears to argue that the doctrines of waiver and equitable tolling excuse her delayed administrative filing.

With respect to waiver, Plaintiff suggests that Defendant waived its timeliness objection because the VA accepted her EEO complaint. (*See* Pl.'s Opp'n 11.) According to Hart, during the December 2, 2013 conversation with Plaintiff about the requirements for filing an EEO claim, they discussed the 45-day EEO counseling deadline, and Hart "indicated to Ms. Branch that [Hart] did not know if her complaint would be timely." (Hart Decl. ¶¶ 9, 10.) Plaintiff did not submit evidence to the contrary. In the Ninth Circuit, acceptance of an untimely complaint for administrative investigation does not waive an agency's right to later object to the timeliness of the complaint. *Boyd*, 752 F.2d at 414 ("[t]he mere receipt and investigation of a complaint does not waive objection to a complainant's failure to comply with the original filing time limit" in the absence of an administrative finding of discrimination). Therefore, Plaintiff has failed to establish a dispute of fact regarding waiver.

Equitable tolling is generally applied "to excuse a claimant's failure to comply with the time limitations where she had neither actual nor constructive notice of the filing period." *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002) (citation omitted). Here, Defendant submits evidence that Plaintiff participated in a new employee orientation in San Francisco in September 2000, at which SFVAMC would have provided her with training materials on EEO complaint procedures and the 45-day timeframe. (Hart Decl. ¶¶ 4, 5, Ex. A.) Defendant also

provides evidence that Plaintiff participated in online EEO training in 2008 and 2010, and that the training included information regarding how to file an EEO claim and deadlines for that process. (Hart Decl. ¶ 6.) Additionally, as noted above, Plaintiff does not dispute that Hart told her about the 45-day EEO counseling deadline during their December 2, 2013 conversation. (Hart Decl. ¶ 10.) Plaintiff offers no evidence to counter these facts. Accordingly, she has failed to show that a dispute of fact exists as to whether equitable tolling applies.

IV. Conclusion

Plaintiff did not initiate EEO counseling within 45 days of the accrual of her claims for discrimination and the failure to accommodate her disability. Plaintiff cannot establish that waiver or equitable tolling excuses her failure to comply with the deadline. Therefore, her remaining causes of action for violation of the Rehabilitation Act and Title VII are untimely. The court grants summary judgment as to those remaining claims.

IT IS SO ORDERED.

Dated: December 4, 2015

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
IT IS SO ORDERED
Donna M. Ryu
United States Magistrate Judge